IN THE SUPREME COURT IN AND FOR THE STATE OF MONTANA

Case No. DA-09-0669

IN RE:

THE ESTATE OF ROBERT CHARLES BOTHAMLEY

OPENING BRIEF

Appealed from the Nineteenth Judicial District of the
State of Montana, in and for the County of Lincoln

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STATEMENT OF THE ISSUES

1. Did the District Court erroneously conclude that Carolyn established that Bob and Carolyn assumed a present marital relationship by consent, competency, cohabitation and public repute?
2. Did the District Court abuse its discretion by allowing into evidence a material exhibit that was disclosed to opposing parties just days before trial?

STATEMENT OF THE CASE

Petitioner and Appellant, Cynthia Zimmerman, will be referred to herein as "Cynthia." Respondent and Appellee, the Estate of Robert Charles Bothamley, will be referred to herein as "the Estate." Cross-Appellant, Pamela Bisson, will be referred to herein as "Pamela." Other Appellees and interested parties are Carolyn Norstebon, referred to herein as "Carolyn," and Carol Alexander, referred to herein as "Carol." This matter is an appeal from the Nineteenth Judicial District Court's Findings of Fact, Conclusions of Law and Order dated November 23, 2009, in which the Court found that the decedent, Robert Charles Bothamley, was married to Carolyn Norstebon by common law of the State of Montana. After Bob's death on December 5, 2006, a probate was opened, and Carolyn claimed to be Bob's wife. Cynthia and Pamela both denied that Carolyn was Bob's wife. A non-jury trial was held on November 17 and 18, 2009. Carolyn was present at the trial and represented by her counsel, Paul Shae. Pamela and Cynthia were also present and represented by their

respective counsel, Dean Chisholm and Scott Hilderman/Colleen Donohoe. Carol Alexander, another daughter of the decedent, was also present and represented by her counsel, Karl Rudbach. After hearing testimony from a number of witnesses and receiving a large number of exhibits into evidence, the Court issued its Findings of Fact, Conclusions of Law and Order finding that Carolyn was the common law wife of Bob. During the course of the hearing, however, Carolyn introduced an exhibit that was objected to by both counsel for Cynthia and counsel for Pamela for surprise, prejudice and late disclosure. In fact, the item had been disclosed only days before trial. Notice of Entry of Judgment was filed December 2, 2009 and provided to all interested parties. It is from the District Court's determination that the disputed exhibit was admissible and from the District Court's determination that Carolyn was Bob's common law wife that both Cynthia and Pamela appeal.

STATEMENT OF FACTS

Bob Bothamley died intestate on December 5, 2006, at the age of 69. Findings of Fact, Conclusions of Law and Order, 2:3-4 (Nov. 23, 2009). He died leaving behind three heirs, daughters Cynthia, Pamela, and Carol. Findings of Fact, Conclusions of Law and Order, 2:9-10. Pamela and Cynthia were both born as issue of Bob's first marriage to Susan Graham. Findings of Fact, Conclusions of Law and Order, 2:10. Bob and Susan divorced when the girls were approximately ages 3 and 5, respectively. Findings of Fact, Conclusions of Law and Order, 2:10-11. Susan

remarried, and Pamela and Cynthia were both adopted by their step-father. Findings of Fact, Conclusions of Law and Order, 2:11-12. Bob also thereafter remarried to his second wife. Findings of Fact, Conclusions of Law and Order, 2:13. Carol was born as issue of Bob's second marriage. Findings of Fact, Conclusions of Law and Order, 2:13. Bob's second marriage lasted over 30 years, and then ended in a contentious and drawn-out divorce, which left Bob leery of ever getting married again. Findings of Fact, Conclusions of Law and Order, 2:13-14. Non-Jury Trial Transcr. 458:13-19, 604:16-24, 605:13-18 (Nov. 17-18, 2009); the Court has a copy of said transcript. Cynthia testified that Bob's divorce from Cynthia's mother was so difficult on him that he said, "I will never go through this again." Non-Jury Trial Transcr. 605:13-18.

Bob and Carolyn met and started dating shortly before 1995. Non-Jury Trial Transcr. 151:23. At the time, both Bob and Carolyn were married to other people. Bob's divorce was finalized in 2000, and Carolyn's was not finalized until approximately 2004. Non-Jury Trial Transcr. 180:20-24, 184:12-20. Carolyn moved in with Bob at his ranch house in Montana in approximately 1995, and there is no dispute that they resided together between approximately 1995 and Bob's death in 2006. Non-Jury Trial Transcr. 167:7.

Bob never told his daughters Cynthia or Pamela that Carolyn was his wife. Non-Jury Trial Transcr. 610:4-13. Bob had regular contact with Cynthia and Pamela during the course of his relationship with Carolyn. Non-Jury Trial Transcr. 601:16-

21, 606:8-13. Bob attended family affairs such as weddings, births of grandchildren, and birthdays, and he sent birthday cards to Cynthia and Pamela on birthdays and holidays. Non-Jury Trial Transcr. 602:2-8, 606:8-19, 656:1-8, 661:8-20. Bob called both daughters and they called him, and he would visit whenever he would pass through California. Non-Jury Trial Transcr. 606:19-607:16, 662:2-20. He gave Pamela away at her wedding. Non-Jury Trial Transcr. 655:14-17. Carolyn promised Pamela and Cynthia that they could review Bob's obituary before it was published, as well as the death certificate. Non-Jury Trial Transcr. 614:11-16, 666:4-13. This never happened; Pamela had to obtain a copy of the death certificate directly from the Lincoln County Clerk and Recorder. Non-Jury Trial Transcr. 614:15-22. After Bob died, his daughters Cynthia and Pamela were surprised to discover that Carolyn was listed as Bob's "spouse" on his death certificate. Non-Jury Trial Transcr. 614:23-615:21.

After they finally received a copy of the death certificate listing Carolyn as "spouse," Cynthia and Pamela were shocked to discover that a probate had been opened and Carolyn had applied and been appointed Personal Representative of the Estate of Robert C. Bothamley, without providing any notice to either Cynthia or Pamela. Non-Jury Trial Transcr. 616:4-7, 668:15-669:18, 669:11-22. Carol had known about the probate and had hidden it from Pamela and Cynthia; Pamela eventually discovered that the probate had been opened in Flathead County, rather

than Lincoln County. Non-Jury Trial Transcr. 668:10-15, 669:17-23. Carol admitted to purposefully excluding Pamela and Cynthia from the probate proceedings. Non-Jury Trial Transcr. 713:1-6.

Carolyn was removed as Personal Representative for mismanaging the Estate. Non-Jury Trial Transcr. 137:10-18. After Carolyn was removed and replaced as Personal Representative, Carolyn made two withdrawals from an account that was in Bob Bothamley's name. Non-Jury Trial Transcr. 138:2-24. Carolyn ultimately ended up owing the Estate about $16,000.00-$17,000.00 for inappropriate expenditures from the Estate account. Non-Jury Trial Transcr. 143:15-17.

At trial, Carolyn offered what was labeled Exhibit 30, a copy of which is attached hereto as Exhibit "A," which is the disputed exhibit that was admitted by Judge Prezeau over objection from both Cynthia and Pamela. Carolyn indicated that she had found an address book among Bob Bothamley's possessions that she removed from the ranch house. Non-Jury Trial Transcr. 170:9-171:8. Carolyn's attorney, Paul Shae, stated that Carolyn found the address book on November 9, 2009, but failed to disclose it to her attorney until a meeting with him scheduled for November 12, 2009. Non-Jury Trial Transcr. 91:22-92:3. Judge Prezeau took notice that the disputed item of evidence was disclosed on Friday, November 13, 2009, which was merely two business days before trial. Non-Jury Trial Transcr. 173:7-10. The address book lists "Carolyn Johnson" as "Wife" and also lists her as Carolyn Norstebon Johnson, but

without the designation as "Wife." Pamela found it odd that the address book listed both Cynthia and Pamela as "Bob's daughter." Non-Jury Trial Transcr. 672:11-14.

The District Court received evidence from over two dozen witnesses regarding whether they believed Carolyn and Bob to be husband and wife. Many witnesses claimed to be friends or acquaintances of Bob and Carolyn. Other witnesses knew very little of Carolyn and/or Bob[1]. Most of the witnesses admitted that they had merely assumed that Bob and Carolyn were married, based upon the fact that they were together much of the time. Non-Jury Trial Transcr. 226:6-7, 232:14-22, 285:16-24, 315:8-9, 328:5-6; 337:17-338:5, 367:19-24, 368:5-7. Several medical care providers made the assumption that Bob and Carolyn were married in their medical history case notes, but none provided any testimony as to whether Bob and Carolyn ever specifically represented themselves as husband and wife. See, generally, Non-Jury Trial Transcr. 489-498. Furthermore, other medical providers made the opposite assumption, listing Carolyn as "companion" or "girlfriend." Non-Jury Trial Transcr. 521:20-22, 562:17-19.

Few, if any, witnesses ever saw Carolyn or Bob wearing a wedding ring, and *Bob never addressed Carolyn as his wife in front of anyone*. Non-Jury Trial Transcr. 36:6-7, 38:8-11, 227:10-21, 234:17-235:6, 270:11-271:4, 205:4-7, 315:8-9, 341:11-

[1]Patricia Bunkrock. Deborah Zugg, and George Hartl both testified that they merely assumed Bob and Carolyn were married because they were together, and none of these witnesses had specifically inquired, nor had Bob or Carolyn ever specified, whether they were husband and wife. Non-Jury Trial Transcr. 245:23-246:8, 248:16-19, 254:4-256:14, 257:12, 275:2-7, 276:3-5.

15, 343:12-15, 368:10-13, 374:20-24, 583:1-5, 588:15-18, 700:18-23. Judge Prezeau noticed this fact and stated, "[Cynthia] just said what the other twenty-five witnesses said, is that he never described Carolyn as his wife, and she never described him as her husband." Non-Jury Trial Transcr. 638:23-639:5. Carolyn could not recall ever telling anyone that the ring she claimed Bob allegedly bought her was a wedding ring. Non-Jury Trial Transcr. 531:10-13.

Several witnesses also testified that, in general, it is their assumption that people who live together and do things together are married. Non-Jury Trial Transcr. 228:20-24, 236:12-19, 307:10-20, 317:5-12, 324:11-23, 328:8-12. The vast majority of the witnesses testified that there were *no affirmative representations* by Bob or Carolyn as to whether they were married. Non-Jury Trial Transcr. 263:12-18, 264:8-13, 267:7-8, 269:21-22, 303:16-24, 320:8-11, 328:12-18, 368:14-17, 373:2-6, 585:10-19. Even Carolyn herself could not recall *one single occasion* when she ever told anyone that she and Bob were married. Non-Jury Trial Transcr. 530:6-16.

Several witnesses who testified that they believed Bob and Carolyn to be married also testified as to their erroneous beliefs regarding common law marriage. Non-Jury Trial Transcr. 288:23-289:4 (Janice Ringsbye: a couple that have been living together for more than five years); Non-Jury Trial Transcr. 308:3-19 (Pat Laveway: if you live together and refer to each other with terms of endearment); Non-

Jury Trial Transcr. 342:14-21 (Cynda Dofelmire: living together for "x" number of years and not dating anyone else).

Bob and Carolyn contemplated becoming husband and wife at some future date. Carolyn's neighbor testified that she had several conversations with Bob and/or Carolyn about them getting married sometime in the future. Non-Jury Trial Transcr. 289:17-21. Specifically, the neighbor testified that Bob and Carolyn had been talking about getting married in Vegas, but were not able to get married before Bob's death. Non-Jury Trial Transcr. 292:3-11, 293:14-20, 297:23-298:5. Darlene Goucher, a long-time friend of Carolyn's, stated that "[Bob and Carolyn] told me that they were going to get married, fiancé." Emphasis added. Non-Jury Trial Transcr. 31:22-23. In response to the question from Mr. Shae, "When did you last hear them refer to each other as fiancé between the two of them," Ms. Goucher stated "I want to say '98, '99." Non-Jury Trial Transcr. 33:18-24. She indicated that she only heard them call each other fiancé one time, which was in 1998 or 1999 (Carolyn's testimony was that she did not consider herself to be married to Bob until at least 2000). Non-Jury Trial Transcr. 43:10-18, 180:20-24. Another friend of Bob and Carolyn's stated that she heard them talk several times about getting around to getting married "one of these days." Non-Jury Trial Transcr. 576:8-19. Carolyn's "sister-in-law" specifically testified that she and Carolyn's brother and Bob and Carolyn were planning a double wedding in Jamaica. Non-Jury Trial Transcr. 354:13-24. She specifically stated that

"if [the trip to Jamaica] had come around, you betcha, we all four would have went and got married." Non-Jury Trial Transcr. 357:8-14. She also testified that the trip to Jamaica was "for all four of us to be officially--all be married." (Emphasis added). Non-Jury Trial Transcr. 363:18-20.

The most compelling testimony proving that Bob and Carolyn contemplated becoming married at some future date were Carolyn's own words. She testified that she would have changed her name to Bothamley if she was married to Bob. Non-Jury Trial Transcr. 386:21-387:6. At first, she testified that she and Bob merely contemplated a formal ceremony for family and friends. Non-Jury Trial Transcr. 388:14-15. That testimony was later severely eroded by her testimony that during one of their trips to Las Vegas in 2004 or 2005, Bob and Carolyn stopped by a chapel and discussed getting married inside the chapel. Non-Jury Trial Transcr. 392:7-15, 536:1-2, 536:14-19. They did not get married that date; Carolyn admitted that the real reason they did not go into the chapel in Vegas that date was that Bob "wasn't ready to go in there that day" and get married. Non-Jury Trial Transcr. 549:1-11. She stated that they had been "two feet from the door of the church." Non-Jury Trial Transcr. 549:14-18. Carolyn had also testified at a deposition, about which she was questioned at trial, that she and Bob had "...always planned to get married legally..." and that "we just never really set a time" for a marriage ceremony. Non-Jury Trial Transcr. 394:22-24, 415:11-14.

When Bob died, Carolyn discussed the status of their relationship with the funeral director. Non-Jury Trial Transcr. 410:21-411:7. She told the funeral director that she was Bob's "partner" for purposes of the obituary, and that is how she was listed in the obituary; not as Bob's wife. Non-Jury Trial Transcr. 411:10-13. A copy of the obituary as it appeared is attached herein as Exhibit "B." She specifically testified that she did not tell the funeral director, the most important person to announce to the world that Bob and Carolyn were married, that she was Bob's wife. Non-Jury Trial Transcr. 411:19-24.

Many other facts in this case indicated that the parties did not consider themselves married, and did not hold themselves out to the public that they were married. When she was divorced in November 2004, Carolyn took the name Carolyn Norstebon (her maiden name) instead of taking Bob Bothamley's last name. Non-Jury Trial Transcr. 184:12-20. She stated that she knew she could not be married to Bob until she was divorced. Non-Jury Trial Transcr. 429:19-24. Bob was more of a "traditional" man; he believed that it was customary for a woman to take on her husband's last name. Non-Jury Trial Transcr. 706:15-19, 719:14-17.

Exhibits 32-34, and 39-41 were all pieces of "junk mail" (as described by the Court, see Non-Jury Trial Transcr. 201:9-15) that Carolyn offered to show that from time to time she went by Carolyn Bothamley. One item offered as Exhibit 42 is even dated *after* Bob's death. Non-Jury Trial Transcr. 204:20. Other exhibits were offered

for the same purpose, such as various bills and other correspondence that were created at the direction of Carolyn or were from service providers that did not know the couple personally. See, generally, Non-Jury Trial Transcr. 188-189, 191, 197-201, 203-205.

On all of the official documents created with Bob's direction or input, such as his bank account transaction record and a motor vehicle title, Carolyn is listed as Carolyn Norstebon or Carolyn Johnson. Non-Jury Trial Transcr. 193:1-5, 195:23-196:1. More often than not, Carolyn went by Carolyn Johnson or Carolyn Norstebon, such as on her driver's license. Non-Jury Trial Transcr. 387:7-9.

On legal and business documents, Bob and Carolyn listed her as "Carolyn Norstebon" or "Carolyn Johnson" and represented their status as something *other than* husband and wife. Carolyn and Bob at no time ever filed any tax returns as "married." Non-Jury Trial Transcr. 439:13-15. Both listed their status as "single" on their tax returns throughout their relationship. Non-Jury Trial Transcr. 439:13-24. When Carolyn obtained or renewed her passport in 2006, she listed herself as Carolyn Norstebon. Non-Jury Trial Transcr. 419:17-14. On Bob's life insurance policy beneficiary designation form, which Bob prepared, he listed Carolyn as "Carolyn Norstebon" and "significant other" rather than spouse. Non-Jury Trial Transcr. 434:18-435:5. On a medical history form dated March 30, 2006, Bob's marital status is listed as "D," which indicated "divorced." Non-Jury Trial Transcr. 443:21-444:17.

Carolyn was listed as "significant other" on other medical forms. Non-Jury Trial Transcr. 449:5-8. As late as November 1, 2006, Bob was listing Carolyn as his "significant other" on an enrollment and change form that was handwritten by Bob. Non-Jury Trial Transcr. 451:9-19. He also listed Carolyn as "significant other" on his VA Designation of Beneficiary form, dated November 1, 2006 and handwritten by Bob, attached herein as Exhibit "C."

Bob and Carolyn had separate checking accounts and neither was a co-signer on the other person's account. Non-Jury Trial Transcr. 416:6-17. They had a number of other separate accounts. Non-Jury Trial Transcr. 416:17-417:4.

Carolyn testified that Bob had proposed to her twice. Non-Jury Trial Transcr. 389:8-13. The Court took notice of this testimony, stating "Does that mean if you propose twice the first proposal didn't mean anything? I don't know." Non-Jury Trial Transcr. 224:3-6. Carolyn stated that the first proposal was in 1999, but that they did not get married because both were still married at the time. Non-Jury Trial Transcr. 390:4-13. After the second proposal, allegedly in 2004, even though both were divorced, they still did not have a marriage ceremony. Non-Jury Trial Transcr. 390:14-24.

Bob's youngest daughter, Carol, who had a close relationship with Carolyn (Non-Jury Trial Transcr. 282:15-21), testified that she felt that Bob and Carolyn were married. Carol admitted that she and Carolyn discussed whether Pamela and Cynthia

should be considered heirs of Bob's estate. Non-Jury Trial Transcr. 65:22-67:5. Carolyn suggested that genetic testing should be done to determine whether they were actually Bob's children. Non-Jury Trial Transcr. 67:10-19.

Bob only referenced a marriage between himself and Carolyn on two separate occasions, in private conversations. First, Carol testified that during a trip to Bob's ranch in Montana in August 2006, she asked Bob during a private conversation whether he was married to Carolyn. Non-Jury Trial Transcr. 58:22-59:9. She indicated that Bob's response was "According to Montana, yes." Non-Jury Trial Transcr. 59:9-11. This was the one and only time Carol ever heard either Bob or Carolyn refer to "marriage" or "being married" regarding Carolyn. Non-Jury Trial Transcr. 86:13-87:1.

Second, Kenneth Alexander, Carol Alexander's husband, also testified at the trial. Non-Jury Trial Transcr. 104:16-18. He testified that during a trip to Montana in August 2006, he noticed that neither Bob nor Carolyn were wearing wedding rings. Non-Jury Trial Transcr. 107:4-6. He testified that during a private conversation, Bob said, "You don't need a ring to be married," and that Bob also said, "We're married." Non-Jury Trial Transcr. 107:7-8. Kenneth also testified that he did not know when Bob and Carol were married, did not receive any particular invitation, notice or confirmation of marriage, and was not aware of any honeymoon. Non-Jury Trial Transcr. 110:7-20. When asked the ultimate question at trial, "And is your belief

[that Bob and Carolyn were married] based on a direct word from Bob Bothamley's mouth," Kenneth replied, "I would say it's on lifestyle, I don't know about direct words." (Emphasis added). Non-Jury Trial Transcr. 122:17-21.

Carol was hazy about the exact start date of Bob and Carolyn's alleged common law marriage, stating that their common law marriage started "around 2000." Non-Jury Trial Transcr. 78:11-12. She did not recall Bob and Carolyn ever celebrating an anniversary, and they apparently never informed Carol of any particular date when they actually became married. Non-Jury Trial Transcr. 79:4-10.

Pamela testified that Bob was savvy regarding business decisions and regarding marriage and divorce. Non-Jury Trial Transcr. 674:5-9. Pamela believed Bob to be very competent, careful and deliberate; not the type of person who would let a marriage creep into existence. Non-Jury Trial Transcr. 674:1-24.

STANDARD OF REVIEW

In reviewing a district court's findings of fact, this Court determines whether those findings are clearly erroneous. *In re the Estate of Alcorn*, 263 Mont. 353, 355, 868 P.2d 629, 630 (1994). This Court uses a three-part test to determine whether a district court's finding of fact is clearly erroneous: (1) if it is not supported by substantial evidence; (2) if the district court misapprehended the effect of the evidence; or (3) if, after reviewing the record, this Court is left with a definite and firm conviction that a mistake has been made. *In re the Estate of Hunsaker*, 1998 MT

279, ¶ 26, 291 Mont. 412, ¶ 26, 968 P.2d 281, ¶ 26 (citing *Interstate Production Credit v. DeSaye*, 250 Mont. 320, 820 P.2d 1285 (1991)). *In re the Marriage of Swanner-Renner*, 2009 MT 186, ¶ 24, 351 Mont. 62, ¶ 24, 209 P.3d 238, ¶ 24. When reviewing conclusions of law, this Court determines whether the district court's interpretation of law is correct. *Alcorn*, 263 Mont. at 355, 868 P.2d at 630. The burden of proof is on the party asserting a common law marriage. *In re the Marriage of Geertz*, 232 Mont. 141, 145, 755 P.2d 34, 37 (1988).

In reviewing whether a district court's determination of whether or not evidence is relevant and admissible, this Court reviews evidentiary rulings for an abuse of discretion. *Stevenson v. Felco Industries, Inc.*, 2009 MT 299, ¶ 16, 352 Mont. 303, ¶ 16, 216 P.3d 763,¶ 16.

SUMMARY OF ARGUMENT

The District Court erred by finding that Bob had consented to a marital relationship with Carolyn. At best, Bob may have contemplated a marriage at some time in the future, but a majority of the facts indicate that he did not consent to a marital relationship. Similarly, Bob and Carolyn told no one that they were married; people simply assumed that they were. None of the witnesses ever asked, with the exception of Carol, whether Bob and Carolyn were husband and wife. Many of the witnesses testified that they believed Bob and Carolyn were contemplating getting married in the future. Therefore, the District Court also erred in finding that the

public repute element of common law marriage was satisfied. Finally, the District Court relied heavily on a disputed piece of evidence, an address book entry that was admitted over objection. It was an abuse of the District Court's discretion to admit evidence that had been disclosed only days before trial, and then rely on that evidence in its Findings. Appellant was subjected to unfair surprise and prejudice, with no curative action by the Court.

ARGUMENT

The first issue presented above regarding common law marriage will be addressed in the first section below, followed by discussion of the evidentiary issue in the second section.

I. The District Court erroneously concluded that Bob and Carolyn assumed a present marital relationship by consent, competency, cohabitation and repute.

Montana law presumes that a man and a woman deporting themselves as husband and wife are legally married, although this presumption is rebuttable. Mont. Code Ann. § 26-1-602(30) (2009). *Geertz*, 232 Mont. at 145, 755 P.2d at 37. Montana therefore recognizes the validity of common law marriages. MCA § 40-1-403 (2003).

For a common law marriage to exist in Montana, four elements must be satisfied:

(1) mutual consent of parties,

(2) competency of both parties to marry,

(3) cohabitation, and

(4) public repute.

Stevens v. Woodmen of the World, 105 Mont. 121, 141 (1937).

The party asserting the marriage must prove all four elements. *Hunsaker*, ¶ 32. Cohabitation and public repute are continuing factors that extend through the life of the marriage. *Swanner-Renner*, ¶ 21.

In this case, the elements of competency of the parties to marry and cohabitation are not in dispute. Therefore, the only disputed elements of common law marriage for this Court to consider are consent and public repute. The District Court erred in finding that Bob consented to a present marital relationship with Carolyn. The District Court also erred in finding that there was "overwhelming evidence" of public repute.

A. The District Court's findings of fact regarding the element of consent are not supported by substantial evidence; the evidence shows that at best, Bob may have had a future intent to enter into a solemnized marriage with Carolyn.

For the purposes of this argument, Appellant would bring the Court's attention to an unpublished disposition of *Vig v. Estate of Hutcheson*, 2008 MT 72N, 342 Mont. 551. In *Estate of Hutcheson*, this Court reviewed Judge Prezeau's Findings of

Fact Conclusions of Law and Order in which he found that no common law marriage existed. In that case, the facts are extremely similar to this case, yet the District Court found "overwhelming" evidence that the parties did not consent to a marital relationship. That case is not being cited for authority herein since it is a memorandum decision, but the inconsistency between that case and this one is worth reviewing in light of the District Court's findings in this case.

To establish consent, the party asserting a common law marriage must present evidence of an agreement between the parties that they would be husband and wife. *Miller v. Sutherland*, 131 Mont. 175, 182, 309 P.2d 322, 326 (1957). Although consent may be implied from conduct, consent must be mutual, and "must always be given with such an intent on the pat of each of the parties that marriage cannot be said to steal upon them unawares." *Hunsaker*, ¶ 34.

In *Marriage of Geertz*, this Court upheld the district court's finding that there was no common law marriage. *Geertz*, 232 Mont. at 145, 755 P.2d at 37. In *Geertz*, the parties were divorced and then resumed cohabitation within a matter of months. *Geertz*, 232 Mont. at 142, 755 P.2d at 35. However, they filed separate tax returns, designating themselves as "single;" they maintained separate bank accounts; they held property separately; the applied for loans listing themselves as single or divorced; and they had separate insurance policies. *Geertz*, 232 Mont. at 143, 755 P.2d at 35-36. Even thought they sometimes held themselves out as man and wife, and even though

the husband had proposed on more than one occasion after they resumed cohabitation, this Court upheld the District Court's finding that the parties failed to establish the mutual consent element of a common law marriage. *Geertz*, 232 Mont. at 145, 755 P.2d at 37. This Court stated that the parties' actions "did not manifest an *understanding that they had entered into a contract* of common law marriage." (Emphasis added). *Geertz*, 232 Mont. at 145, 755 P.2d at 37.

In *Estate of Alcorn*, this Court upheld the district court's determination that the parties had consented to a common law marriage. *Alcorn*, 263 Mont. at 357, 868 P.2d at 631. The parties made very apparent their consent and agreement to marriage. The wife wore a ring on her left hand with a customized horseshoe design that was also incorporated into their driveway with their names. *Alcorn*, 263 Mont. at 357, 868 P.2d at 631.

In *Estate of Hunsaker*, this Court reversed the district court's determination of no common law marriage, holding that the court misapprehended the evidence. *Hunsaker*, ¶ 28. The wife wore an engagement ring on her left hand, and the parties had a custom-designed grandfather clock with a large "H" for Hunsaker with both of their initials engraved in it. *Hunsaker*, ¶¶ 36-37. This Court also relied on the wife's testimony that she "felt" married to the husband and that she believed he "felt" married to her. *Hunsaker*, ¶ 37. In her dissent, Justice Gray disagreed with the majority, stating that mere statements that a person "believed" to be married, or "felt"

married, do not rise to mutual consent and agreement to a marital relationship. *Hunsaker*, ¶ 50.

In *Estate of Ober*, the district court received evidence that would both support and refute a finding that the couple had consented and agreed to enter a common law marriage. *In re the Estate of Ober*, 2003 MT 7, ¶¶ 11-12, 314 Mont. 20, ¶¶ 11-12, 62 P.3d 1114, ¶¶ 11-12. In that case, the wife testified that the husband had proposed, and that they had exchanged rings after the proposal. *Ober*, ¶ 12. She wore her ring almost continuously, although his ring had to be cut off after an accident. *Ober*, ¶ 12. The couple also used address labels to pay bills and for correspondence that read "John or Selma Ober." *Ober*, ¶ 13. This Court found that all of the above supported a finding that the parties had consented to a marital relationship. *Ober*, ¶ 16.

Bob did not consent to a marital relationship during his relationship with Carolyn. At best, Carolyn presented evidence that Bob intended to marry her at some future date in a formal ceremony. Carolyn's testimony regarding the Las Vegas chapel is telling in this regard. Carolyn testified that during one of their trips to Las Vegas in 2004 or 2005, Bob and Carolyn stopped by a chapel in a casino and discussed getting married inside the chapel. They did not get married that date; Carolyn admitted that the real reason they did not go into the chapel in Vegas that date was that Bob "wasn't ready to go in there that day" and get married. Carolyn had also testified that she and Bob had "...always planned to get married legally..." and

that "we just never really set a time" for a marriage ceremony. Other witnesses testified that they believed Bob and Carolyn intended to get married some day in the future. Clearly, Bob did not consent to a present marital relationship during his life. Similar to *Geertz*, Bob did not believe that he had entered into the contract of marriage because he continued to file taxes separately and on all important documents indicated that Carolyn was his "significant other" or similar designation other than "spouse." His statements to Carol and her husband about being married "according to Montana" may have been based upon a misinterpretation of the law, and may be merely an indication that he had an intent to make Carolyn his wife someday in the future. It is undisputed that Bob had a very contentious divorce from his second wife and did not want to get married again.

Unlike the parties in *Alcorn* and *Hunsaker*, neither Carolyn nor Bob wore, nor did they display, any other outward signs of a marital relationship other than being together a lot of the time. The evidence presented in this case was insufficient to prove by a preponderance that Bob ever consented to a present marital relationship with Carolyn.

B. The District Court's findings of fact regarding the element of public repute are not supported by substantial evidence; the evidence shows that Bob and Carolyn never held themselves out to the public as husband and wife.

Conduct that establishes public repute occurs continually over a period of time. *In re the Estate of Murnion*, 212 Mont. 107, 118, 686 P.2d 893, 899 (1984). Public repute requires that "the parties must enter upon a *course of conduct* to establish their repute as man and wife." *Miller*, 131 Mont. at 184, 309 P.2d at 327. Allowing people to merely assume that two people are married is insufficient to establish a common law marriage. *Hunsaker*, ¶ 42.

A common law marriage does not exist if the parties have kept their marital relationship secret. *Miller*, 131 Mont. at 185, 309 P.2d at 328. *Ober*, ¶ 18. In *Miller v. Sutherland*, the alleged common law wife (Sutherland) did not present herself as a married woman to her peers at school or students. *Miller*, 131 Mont. at 178, 309 P.2d at 324. Employees of the alleged common law husband (Miller) testified that Sutherland was never introduced as "Mrs. Miller," even after Miller allegedly asked Sutherland to marry him. *Miller*, 131 Mont. at 180, 309 P.2d at 325. Many friends and acquaintances in the community testified that they assumed the parties were married, but had never actually been told by either Miller or Sutherland that they were married. *Miller*, 131 Mont. at 180-181, 309 P.2d at 325. Although sometimes Miller and Sutherland referred to each other as husband and wife, they did not refer to each other in that way in their own community. *Miller*, 131 Mont. at 180-181, 309 P.2d at 325.

In *Estate of Sartain*, this Court upheld the district court's determination that there was no common law marriage where the "wife" made a claim against the Estate based upon an alleged common law marriage. *In re the Estate of Sartain*, 212 Mont. 206, 686 P.2d 909 (1984). The parties at times represented themselves to be married, and at other times they did not. *Sartain*, 212 Mont. at 208, 686 P.2d at 911. They maintained separate bank accounts, filed separate tax returns as "single," and maintained separate business dealings. *Sartain*, 212 Mont. at 209, 686 P.2d at 911. The "wife" kept her last name on her driver's license and in conjunction with her employment. *Sartain*, 212 Mont. at 209, 686 P.2d at 911. After her divorce, she changed back to her maiden name rather than take the "husband's" name. *Sartain*, 212 Mont. at 209, 686 P.2d at 911.

In *Hunsaker*, the parties displayed their relationship openly to the public and in no uncertain terms. The parties had a sign in front of their house with a design that incorporated their initials and a grandfather clock with the same design that was prominently displayed in their home with a large "H" for Hunsaker. *Hunsaker*, ¶¶ 7, 41. Hunsaker's brother stated that the wife was Hunsaker's "surviving spouse." *Hunsaker*, ¶ 41. The wife's voice on the answering machine stated "this is the Hunsaker residence." *Hunsaker*, ¶¶ 6, 41. Other witnesses, including attorneys who had represented the husband, testified that the husband referred to the wife as "wife" on many occasions. *Hunsaker*, ¶ 41.

The parties in *Alcorn* established the element of repute by clearly and unequivocally indicating to others that they were married. *Alcorn*, 263 Mont. at 360, 868 P.2d at 633. Several family members of both parties testified that they considered the parties married. *Alcorn*, 263 Mont. at 359, 868 P.2d at 632. Also, a number of people close to the couple, including a district court judge, testified that the they frequently heard the couple refer to each other as "husband" and "wife." *Alcorn*, 263 Mont. at 359, 868 P.2d at 632.

In this case, similar to *Miller* and *Sartain* where this Court found no common law marriage, Bob and Carolyn kept their names, taxes, accounts, and general business lives separate. Carolyn presented no explanation as to why Bob chose to keep their financial dealings separate. In stark contrast to *Alcorn* and *Hunsaker*, neither Bob nor Carolyn ever referred to each other as "husband" or "wife" in public. Although a majority of the witnesses merely *assumed* that Bob and Carolyn were married, in *Hunsaker* this Court held that this fact alone is not evidence of public repute. The medical records introduced as evidence, as well as the "junk mail" described in the Facts section above were also based upon assumptions made by service providers. The only witnesses that ever heard Bob refer to himself as married to Carolyn were Carol and her husband, and that was only once, in a private conversation, during Bob and Carolyn's entire relationship.

In this case, the District Court erred in finding that the parties had established a common law marriage by public repute.

II. The District Court abused its discretion in admitting into evidence, over objection of Cynthia and Pamela, the address book that was disclosed by Carolyn just days before trial.

It is clear from the Findings of Fact that the District Court relied heavily on disputed evidence in making its determination that Bob and Carolyn had a common law marriage. Findings of Fact, Conclusions of Law and Order, 2:7. During the course of trial, the Court allowed Carolyn to admit into evidence an address book which contained an entry for "CAROLYN JOHNSON (WIFE)." This evidence was disclosed only days before trial, despite the passage of nearly three years between Bob's death and the trial date. It was not listed as an Exhibit in the pretrial order. The evidence was not only a surprise, but was incredibly prejudicial and should not have been allowed. The District Court erred by admitting such evidence, and the relying upon this disputed evidence in concluding that there was a valid common law marriage.

A district court has broad discretion regarding the admissibility of evidence at trial. Rule 104, Mont.R.Evid. (2010). However, this Court has stated that "that discretion nonetheless is not unlimited and must be exercised in such a manner as to afford a fair trial to all parties." *Circle S Seeds of Montana, Inc. v. T & M*

Transporting, Inc., 2006 MT 25, ¶ 24, 331 Mont. 76, ¶ 24, 130 P.3d 150, ¶ 24. This Court is the "final arbiter of questions regarding the ultimate admissibility of evidence." *Stevenson v. Felco Industries, Inc.*, 2009 MT 299, ¶ 46, 352 Mont. 303, ¶ 46, 216 P.3d 763, ¶ 46. It is an abuse of discretion for a district court to admit late-disclosed evidence when the only excuse offered for the delayed disclosure is lack of diligence. *Workman v. McIntyre Construction Co.*, 190 Mont. 5, 12, 617 P.2d 1281, 1285 (1980). When late disclosure of evidence or witnesses substantially affects the trial strategy and rights of the opposing parties, and prevents them from having a fair trial, it is an abuse of discretion. *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 18, 314 Mont. 303, ¶ 18, 65 P.3d 570, ¶ 18.

The purpose of the pretrial order, among other things, is to "prevent surprise, to simplify the issues, and to permit counsel to prepare their case for trial on the basis of the pretrial order." *Workman v. McIntyre Construction Co.*, 190 Mont. at 12, 617 P.2d at 1285. The objection of surprise is available on appeal even though no request for continuance is made at trial. *Glacier National Bank v. Challinor*, 253 Mont. 412, 833 P.2d 1046 (1992) (citing *Bache v. Gilden*, 827 P.2d 817 (Mont. 1992)).

Appellant objected the admission of the address book at trial, yet the District Court allowed it anyway. Judge Prezeau noted that "You know, it's been a couple years now your client is supposed to be digging this stuff up, and we are getting it the week [sic] before trial." Non-Jury Trial Transcr. 174:8-13. Judge Prezeau also

commented that "This file is about five inches thick because of problems that we have been having for two years trying to get all this stuff discovered and exchanged." Non-Jury Trial Transcr. 93:1-6.

The address book was disclosed on a Friday, with trial set to begin the following Tuesday. None of the opposing parties were able to have the address book or its contents analyzed in any meaningful way. Trial had already been continued once due to an emergency of one of the attorneys. The clients had all made their travel arrangements to come to Montana, or were already there by the time the book was disclosed. Asking for a continuance made no sense under the circumstances.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, Mont.R.Evid. (2010). On this basis, the District Court could have excluded the evidence due to its unfairly prejudicial effect. Instead, the Court decided to admit the evidence over objection, which was a manifest abuse of discretion.

The parties were under a scheduling order set by the District Court which included deadlines for providing exhibits and responding to discovery. There is no question that the late disclosure of the address book violated the terms of not only the scheduling order, but also the pretrial order. The address book was not listed as an exhibit on the pre-trial order. The District Court could also have excluded the evidence because it was not included as part of the pretrial order. Instead, the District

Court allowed the entire exhibit to be admitted without any discovery sanction, and then relied on that evidence in its Findings of Fact.

The only excuse for the late disclosure of the address book was that it had been buried among some clothes at Carolyn's house. There is absolutely no reason why this item could not have been discovered with reasonable diligence in time to prevent surprise and prejudice to Appellant. As such, it was an abuse of discretion for the District Court to admit the address book into evidence.

CONCLUSION

As Judge Prezeau stated at the close of the trial, "this is a close case" and suggested that neither party should be feeling very confident on how the District Court would rule. Non-Jury Trial Transcr. 668:10-15. However, some time between the end of the trial and the District Court's Findings of Fact, Conclusions of Law and Order, the District Court changed his mind and decided that the "great weight" of evidence in favor of a common law marriage was "overwhelming." Findings of Fact, Conclusions of Law and Order, 2:11, 2:24. The evidence shows that Bob did not have a present intent to be married to Carolyn, and that neither Bob nor Carolyn ever actually told anyone they were married, other than perhaps Carol and her husband. Furthermore, the Court relied on a disputed and late-disclosed piece of evidence to conclude that the parties were common law married. The District Court's findings of fact were clearly erroneous, and its legal conclusions incorrect. The admission of

late-disclosed and prejudicial evidence was an abuse of discretion and denied Appellant a fair trial. The District Court's decision should be reversed.

DATED this 22nd day of April, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Appeal Brief is printed with a proportionately spaced Tines New roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 6.1 for Windows, is not more than 10,000 words (7,000 for reply), not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 22nd day of April, 2010.

JOHNSON, BERG, MCEVOY & BOSTOCK, PLLP

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 22nd day of April, 2010, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, either by mailing, hand delivery, or otherwise, as indicated below.

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_____

Scott Hilderman

APPENDIX TO APPELLANT'S OPENING BRIEF

Appealed from the Nineteenth Judicial District of the
State of Montana, in and for the County of Lincoln